



SUPREME COURT OF CANADA

CITATION: 6362222 Canada inc.
v. Prelco inc., 2021 SCC 39

APPEAL HEARD: December 3,
2020

JUDGMENT RENDERED:
October 15, 2021

DOCKET: 38904

BETWEEN:

6362222 Canada inc.
Appellant

and

Prelco inc.
Respondent

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

JOINT REASONS FOR JUDGMENT: Wagner C.J. and Kasirer J. (Abella, Moldaver, Karakatsanis,
(paras. 1 to 104) Côté, Brown, Rowe and Martin JJ. concurring)

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6362222 Canada inc.

Appellant

v.

Prelco inc.

Respondent

Indexed as: 6362222 Canada inc. v. Prelco inc.

2021 SCC 39

File No.: 38904.

2020: December 3; 2021: October 15.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC

Contract — Nonperformance — Non-liability clause — Doctrine of breach of fundamental obligation — Public order — Objective cause of obligation — Contract by mutual agreement including non-liability clause entered into between manufacturing company and consulting firm specialized in evaluation and implementation of integrated management computer systems — Action in damages brought by company against consulting firm for breach of its contractual obligations

because of fault committed in implementing computer system — Whether doctrine of breach of fundamental obligation can render inoperative non-liability clause that was freely negotiated by legal persons — Civil Code of Québec, arts. 1371, 1437, 1474.

6362222 Canada inc. (“Createch”) is a consulting firm specialized in performance improvement and in the implementation of integrated management systems. Prelco inc. is a manufacturing company that makes and transforms flat glass. In 2008, Prelco asked Createch for advice regarding its computer systems. A draft contract prepared by Createch under which it was to supply software and professional services in order to implement an integrated management system at Prelco was then submitted to Prelco. Prelco asked for no changes to the proposed general conditions, which included provisions concerning the parties’ general responsibilities. One of the provisions, cl. 7, entitled [TRANSLATION] “Limited Liability”, stipulated that Createch’s liability to Prelco for damages that could be attributed to any cause whatsoever would be limited to amounts paid to Createch under the contract and that if such damages resulted from the delivery of unsatisfactory services, Createch’s liability would be limited to the amount of any fees paid in relation to the unsatisfactory services. A further stipulation was that Createch could not be held liable for any damages resulting from the loss of data, profits or revenue or from the use of products or for any other special, consequential or indirect damages relating to services and/or material provided pursuant to the contract. The parties signed the contract in April 2008.

When the system was implemented, numerous problems arose, and Prelco decided to terminate its contractual relationship with Createch in the spring of 2010. Another firm was then engaged to make the integrated management system functional. Prelco brought an action against Createch for \$6,246,648.94 in damages for the reimbursement of an overpayment, costs for restoring the system, claims from customers, and loss of profits. Createch in turn filed a cross-application for \$331,134.42, the unpaid balance for the project.

The Superior Court granted Prelco's application and ordered Createch to pay Prelco \$2,203,400 in damages. It also granted Createch's cross-application. It concluded that cl. 7 of the contract was inoperative on the basis of the doctrine of breach of a fundamental obligation, according to which an exoneration clause or limitation of liability clause is without effect if it relates to the very essence of an obligation. The court found that Createch, having misunderstood the scale and complexity of Prelco's operations, had committed a fault in its initial choice as to the approach to take in implementing the management system and had as a result breached its fundamental obligation. The Court of Appeal dismissed Createch's appeal, which concerned the limitation of liability clause, and Prelco's cross-appeal, which concerned the calculation of damages and the amount representing lost sales.

Held: The appeal should be allowed.

The doctrine of breach of a fundamental obligation does not apply to the fault committed by Createch so as to negate cl. 7 of the contract. Neither of the possible

legal bases for this doctrine — (a) validity of the clause having regard to public order and (b) validity of the clause having regard to the requirement relating to the cause of the obligation — applies in this case.

The rule that non-liability clauses are valid in principle has been settled law since *The Glengoil Steamship Co. v. Pilkington* (1897), 28 S.C.R. 146, and it was subsequently accepted in Quebec positive law. This rule derives from autonomy of the will and its corollary, freedom of contract, both of which are general principles of the general law of obligations in Quebec civil law. However, the rule is limited by legislative and judicial public order, respect for which is set up in private law as a mandatory rule of general application on the basis of arts. 8 and 9 of the *Civil Code of Québec* (“C.C.Q.”).

Although art. 1474 C.C.Q. implicitly confirms the validity in principle of non-liability clauses, it sets limits in the name of public order of direction that necessitate the absolute nullity of incompatible clauses. First of all, the first paragraph of art. 1474 C.C.Q., by prohibiting non-liability clauses where there is gross or intentional fault, discourages recklessness, fraud, negligence and deliberate faults, including in contracts by mutual agreement. Next, the legislature made it clear in the second paragraph that, regardless of the seriousness of the fault and despite the principle of freedom of contract, no one may exclude or limit his or her liability for bodily or moral injury.

As for art. 1437 *C.C.Q.*, it sets a limit that is of public order of protection, that is, one the purpose of which is to protect a contracting party who is presumed to be economically weaker. This article expressly recognizes the application of the doctrine of breach of a fundamental obligation in Quebec civil law where there is an abusive contract clause, but limits it to consumer contracts (defined in art. 1384 *C.C.Q.*) and contracts of adhesion (art. 1379 *C.C.Q.*), which are characterized by an imbalance between the parties. A clause that departs from the fundamental obligations of a contract to such an extent that it changes the nature of the contract is considered to be abusive, and therefore null. Although the validity of a non-liability clause is also open to challenge in other cases specified by the legislature in relation to nominate contracts, the *Code* provides for no rule of general application that falls under public order of protection, including one relating to a breach of a fundamental obligation.

Public order does not have the effect, generally, of rendering a non-liability clause relating to a fundamental obligation in a contract by mutual agreement inoperative. At the time of the reform of the *Civil Code*, the legislature spoke directly to the purpose of the concept of public order and intervened to validate the use of non-liability clauses in cases to which art. 1437 *C.C.Q.* does not apply. Subject to the constraints provided for in art. 1474 *C.C.Q.*, a person may exclude or limit his or her liability for material injury caused to another through a fault that is neither intentional nor gross. Everything suggests that the legislature deliberately chose not to include such a mandatory rule to regulate such clauses in the *Civil Code of Québec*, preferring to leave it to sophisticated parties to themselves manage the risks of nonperformance.

As for the second legal basis for the doctrine, total absence of cause, it stems from the requirement, spoken to in art. 1371 *C.C.Q.*, to the effect that it is of the essence of an obligation arising out of a juridical act that there be a cause which justifies its existence. What is in question here is the concept of the objective cause, that is, the logical, impersonal and abstract reason that justifies a party's acceptance of his or her obligations, or the performance of the correlative obligation in the synallagmatic contract. Thus, some contract clauses that deprive the correlative obligation of its cause within the meaning of art. 1371 *C.C.Q.* may affect the validity of the obligation, because the reciprocal nature of the contractual relationship is called into question. This is true, for example, of certain no obligation clauses that exclude all prestations that would normally be owed by the debtor, with the result that the creditor's obligations lack reciprocal prestations. Two competing views are advanced by authors on the question whether a non-liability clause relating to the fundamental obligation of a contract has the effect of depriving the obligation of its cause. The first is that an exoneration clause or limitation of liability clause cannot deprive the correlative obligation of its cause, as a debtor's obligation does not cease to exist simply because a clause limits or excludes his or her liability in the event of nonperformance. Moreover, because art. 1474 para. 1 *C.C.Q.* bars a debtor from relying on a non-liability clause in a case of gross or intentional fault, the debtor cannot arbitrarily refuse to perform an obligation. There are other authors who maintain that a non-liability clause that is akin to a no claims clause, one that deprives the creditor of the obligation of any remedy to sanction nonperformance, can in fact deprive an obligation of its cause. The disagreement among the authors is not in issue in this case.

This is not a situation in which the counterprestation is insignificant, and even less one in which it is non-existent. The sanction for nonperformance of the fundamental obligation remains, and it cannot be said that the obligation is deprived of its objective cause. It would therefore be more prudent to refrain from answering the question in relation to the disagreement among the authors in the abstract without taking account of practical difficulties that could arise in the future.

In this case, on the basis of the rule stated by the Court in *Glengoil* and reaffirmed under the auspices of the *Civil Code of Québec*, cl. 7 is valid and the parties were free to include it in their contract. From the perspective of art. 1474 *C.C.Q.*, Createch's breach of an obligation of means was a simple fault and not a gross or intentional fault, one that caused material injury and not bodily or moral injury. Furthermore, there is no authority for presenting breach of a fundamental obligation as a separate category of fault, one that is more serious than or qualitatively different from a simple fault. The clause on which Createch relies is in a contract by mutual agreement that was negotiated by two sophisticated legal persons and not in a contract of adhesion or a consumer contract as under art. 1437 *C.C.Q.* The clause is not ambiguous, and the trial judge could not annul it. The will of the parties had to be respected. Clause 7 does not violate any rule of legislative or judicial public order, nor is there any specific rule relating to nominate contracts that applies to the facts of this case. There is nothing in the case that would require the courts to intervene to protect a party who is weak or at a disadvantage economically.

Nor could the concept of cause of an obligation justify the decision of the courts below in this case. Clause 7 is not a no obligation clause that would exclude the reciprocity of obligations, as Createch owed substantial obligations to Prelco, which Prelco does not deny. Regardless of whether the position of the authors in whose opinion a no claims clause can deprive an obligation of its cause were accepted, the clause at issue in this case could not be so characterized. The first paragraph of the clause can be equated to an authorization of specific performance by replacement. The clause permits Prelco both to keep the integrated management system and to obtain damages for unsatisfactory services, as well as to be compensated for necessary costs for specific performance by replacement. This clause excludes any reparation for loss of profits arising from a simple fault. Because Createch's work was found to be useful, the clause barred a claim based on an overpayment for the services provided by Createch. There is therefore a cause. Moreover, the clause does not exclude all sanctions, given that, from the moment the contract was formed, specific performance was possible, and indeed contemplated, in the event of nonperformance. This contract is therefore not one that has no counterprestation whatsoever. The cause of the obligation does not permit a court to create a scheme for lesion between unprotected persons of full age; such a scheme has in fact been rejected by the legislature.

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National Bank) v. *Soucisse*, [1981] 2 S.C.R. 339; *Montréal (Ville)* v. *Lonardi*, 2018 SCC 29, [2018] 2 S.C.R. 103; *Cie Immobilière Viger Ltée* v. *Giguère Inc.*, [1977] 2 S.C.R. 67; *The Glengoil Steamship Co. v. Pilkington* (1897), 28 S.C.R. 146; *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607; *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719; *Garcia Transport Ltée* v. *Royal Trust Co.*, [1992] 2 S.C.R. 499; *Djamad v. Banque Royale du Canada*, 2021 QCCA 371; *Audet v. Transamerica Life Canada*, 2012 QCCA 1746, [2012] R.J.Q. 1844; *Ferme Franky 2004 inc. v. Gestions Pierre Saint-Cyr inc. (Centrale de contrôle d'alarmes du Québec)*, 2014 QCCA 848; *Karrum Realities Inc. v. Ama Investments Inc.*, 2007 QCCA 880; *9092-3335 Québec inc. v. 4364856 Canada inc.*, 2019 QCCS 3666; *Association pour la protection des automobilistes inc. v. Toyota Canada inc.*, 2008 QCCA 761, [2008] R.J.Q. 918; *Quebec (Commission des normes du travail)* v. *Asphalte Desjardins inc.*, 2014 SCC 51, [2014] 2 S.C.R. 514; *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101; *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936; *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561, aff'd [1997] 3 S.C.R. 844; *Bank of Montreal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429; *Ostiguy v. Allie*, 2017 SCC 22, [2017] 1 S.C.R. 402; *Poissonnerie Bari v. Gestion Inter-parc Inc. (National Tilden)*, 2002 CanLII 111; *Conseil des ports nationaux v. Swift Canadian Co. Ltd.*, [1953] B.R. 730; *Southern Canada Power Co. Ltd. v. Conserverie de Napierville Ltée*, [1967] B.R. 907; *Western Assurance Co. v. Desgagnés*, [1976] 1 S.C.R. 286; *Fenêtres St-Jean Inc. v. Banque Nationale du Canada*, [1990] 69 D.L.R. (4th) 384; *Impact Graphics Ltd. v.*

B.P.G. Central Security Corp., [1995] AZ-95021939; *Empire Cold Storage Co. Ltd. v. La Cie de Volailles Maxi Ltée*, 1995 CanLII 4828; *BNP Paribas (Canada) v. Ikea Property Ltd.*, 2005 QCCA 297, [2005] R.R.A. 319; *Samen Investments Inc. v. Monit Management Ltd.*, 2014 QCCA 826; *Société de gestion Complan (1980) inc. v. Bell Distribution inc.*, 2009 QCCS 2881, [2009] R.D.I. 569, aff'd 2011 QCCA 320; *Thériault v. Dumas*, 2000 CanLII 5214; *Pruneau v. Société d'agriculture du comté de Richmond*, 2006 QCCQ 12523; *Axa Assurances inc. v. Assurances générales des Caisses Desjardins inc.*, 2009 QCCS 862, [2009] R.J.Q. 1104; *Canadian National Railway Company v. Ace European Group Ltd.*, 2019 QCCA 1374; *Fortin v. Chrétien*, 2001 SCC 45, [2001] 2 S.C.R. 500.

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Civil Code of Québec, arts. 6, 7, 8, 9, 424, 1371, 1375, 1378, 1379, 1380, 1381, 1384, 1405, 1410 para. 1, 1411, 1427, 1434, 1437, 1438, 1458, 1474, 1475, 1602, 1613, 1622, 1732, 1733, 1863, 1893, 1900 para. 1, 2070, 2092, 2118, 2298, 2332, 2805.

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APPEAL from a judgment of the Quebec Court of Appeal (Chamberland, Bélanger and Rancourt JJ.A.), 2019 QCCA 1457, [2019] AZ-51626648, [2019] J.Q. no. 7622 (QL), 2019 CarswellQue 7605 (WL Can.), affirming a decision of Ouellet J., 2016 QCCS 4086, [2016] AZ-51318171, [2016] J.Q. no. 10862 (QL), 2016 CarswellQue 8027 (WL Can.). Appeal allowed.

Guy J. Pratte and Stéphane Richer, for the appellant.

Catherine Cloutier and André Johnson, for the respondent.

English version of the judgment of the Court delivered by

THE CHIEF JUSTICE AND KASIRER J. —

I. Introduction

[1] This appeal raises the question whether a non-liability clause in a contract is valid in respect of a breach of a fundamental obligation in Quebec civil law. The Superior Court declared (2016 QCCS 4086), on the basis that an exoneration clause or limitation of liability clause is without effect if it relates to the very essence of an obligation — the [TRANSLATION] “doctrine of breach of a fundamental obligation” — that a limitation of liability clause in a freely negotiated contract for services between

the appellant, 6362222 Canada inc. (“Createch”), and the respondent, Prelco inc., was inoperative.

[2] In this case, Createch breached its fundamental obligation under the contract, namely to inquire into Prelco’s specific operating needs and requirements and to propose an approach to implementing an integrated management system that would be capable of satisfying them. The trial judge concluded that Createch could not rely on the clause in question in order to limit its liability for material injury it had caused to Prelco. The Court of Appeal confirmed that conclusion, explaining that the doctrine accepted by the trial judge exists in Quebec law and that it applied in this case (2019 QCCA 1457).

[3] There are two possible legal bases for the existence of the doctrine and for applying it to this case, and they do not have the same justification. The first is that a non-liability clause relating to a fundamental obligation is inoperative if it is contrary to a rule of public order that limits freedom of contract. The second is that a non-liability clause is inoperative if it releases the debtor from all obligations to the creditor, because the clause thereby deprives the creditor’s correlative obligation of its cause and is therefore incompatible with the very existence of the fundamental obligation flowing from the contract as a synallagmatic act. These two bases — public order and absence of an objective cause of the obligation — are central to the dispute between the parties.

[4] Although the Court of Appeal was right to refer to public order and absence of a cause in support of its analysis of the validity of the clause at issue, we nonetheless conclude that the appeal should be allowed. Respectfully stated, neither of the legal bases for the doctrine suffices to negate the non-liability clause to which the parties freely consented in the case at bar, as neither public order nor the non-existence of the obligation can be successfully argued in this appeal.

[5] While it is true that the first basis for the doctrine does apply in certain specific situations provided for in the *Civil Code of Québec* (“*C.C.Q.*” or “*Code*”), public order does not have the effect, generally, of rendering a non-liability clause relating to a fundamental obligation in a contract by mutual agreement inoperative. The opposite conclusion would be contrary to the scheme of the *Code*. The legislature, by addressing clauses that are inconsistent with higher values it intentionally associated with public order, has allowed sophisticated parties to agree to the allocation of risk in contexts to which the *Code* does not explicitly refer. As to the second basis, the clause at issue does not deprive the obligation of its objective cause. It is common ground that the prestation agreed to is due from the debtor, Createch, even if the sanctions for nonperformance of the agreement are undermined by the effect of the non-liability clause. The creditor, Prelco, in fact concedes that it gave Createch a [TRANSLATION] “chance to correct its errors and make specific performance” (R.F., at para. 121). An effective sanction, namely specific performance and agreed damages for unsatisfactory services, is still possible. This sanction reflects an obligation that has a cause —

Createch's contractual counterprestation — an obligation whose existence is not open to question.

II. Background

[6] The business relationship between Createch and Prelco began in 2007. Createch is a consulting firm specialized in performance improvement and in the implementation of integrated management systems. Prelco is a large manufacturing company that makes and transforms flat glass for various architectural and industrial uses. Its production operations are conducted in several plants — all of them interconnected — that are located in Rivière-du-Loup, in Montréal and in Edmundston, New Brunswick.

[7] Prelco engaged Createch to improve the company's business processes relating to customer service. A number of projects for that purpose were carried out in 2007 and 2008, and all of them met Prelco's expectations. While doing this work, Createch informed Prelco that its computer systems were not particularly efficient, as they were composed of a large number of programs whose databases functioned autonomously. Prelco asked Createch's advice on this.

[8] Createch agreed to conduct a summary analysis of the systems in question. Upon the completion of that analysis, Prelco invited Createch, in late February or early March 2008, to present a proposal for the supply of software and professional services in order to implement an integrated management system in its business.

[9] A draft contract prepared by Createch in 2008 was thus submitted to Prelco. Negotiations then took place. Prelco asked for no changes to the proposed general conditions (Sup. Ct. reasons, at paras. 20-22 (CanLII)), which included provisions concerning the parties' general responsibilities.

[10] According to the provisions in question, responsibility for [TRANSLATION] "implementation and deliverables" was in some instances said to be "shared" by the parties, whereas in others it amounted, for Createch only, to a "limited" responsibility that consisted in providing "ad hoc support as well as advice" (joint sch., vol. I, at p. 244). Finally there were some tasks for which Prelco was to be fully responsible. The draft contract also included an estimate of the time each of the parties was to spend on the project.

[11] The other clauses of the proposed general conditions included cl. 7 entitled [TRANSLATION] "Limited Liability", which is central to this case:

[TRANSLATION] Createch's liability to the client for damages that can be attributed to any cause whatsoever, regardless of the nature of the action, whether provided for in the agreement or delictual, shall be limited to amounts paid to Createch under the Agreement unless such damages result from gross negligence or wilful misconduct on Createch's part. If such damages result from the delivery of unsatisfactory services, Createch's liability shall be limited to the amount of any fees paid in relation to the said unsatisfactory services.

Createch may not be held liable for any damages resulting from the loss of data, profits or revenue or from the use of products or for any other special, consequential or indirect damages relating to services and/or material provided pursuant to the Agreement unless such damages result from gross negligence or wilful misconduct on Createch's part.

(joint sch., vol. I, at p. 227)

[12] There were nonetheless discussions about the sharing of risks relating to cost overruns for services, and these resulted in Createch accepting a reduced hourly rate of 50 percent for the “contingency of the project” portion.

[13] In April 2008, the parties signed an agreement (“Contract”) for the implementation at Prelco of a Microsoft Dynamics NAV integrated management solution, a prestation whose estimated value was \$650,574. The amount payable to Createch was approximate, because a monthly billing method [TRANSLATION] “on a time and materials basis in accordance with hours used and payable upon receipt of the invoice” was provided for (joint sch., vol. I, at p. 246). Clause 7 quoted above ultimately appeared verbatim in the Contract.

[14] When the system was implemented, numerous problems arose: inconsistent invoices sent to customers, errors in putting orders into production, shipping delays, and inefficiency of the planning and production system, which was slow. Faced with these recurring problems, Prelco terminated its contractual relationship with Createch in the spring of 2010 and then engaged another firm, Irisco, to make the integrated management system functional. After Irisco had resolved the problems, the integrated management system functioned properly. Prelco was able to use the system and to manage its production, although it did not benefit from all the expected advantages.

[15] Prelco brought an action against Createch for \$6,246,648.94 in damages. This amount related to the reimbursement of an overpayment, costs for restoring the system, the reimbursement of claims from customers, and loss of profits. Createch in turn filed a cross-application for \$331,134.42, the unpaid balance for the project.

III. Judicial History

A. *Quebec Superior Court, 2016 QCCS 4086 (Ouellet J.)*

[16] The trial judge found that the integrated management system's performance problems could be attributed to an erroneous approach adopted by Createch on beginning the project. Rather than personalizing the NAV software, Createch should have integrated into it [TRANSLATION] "proven programs that were available on the market" (para. 169).

[17] In the trial judge's view, because Createch's conduct [TRANSLATION] "did not show gross recklessness, gross carelessness or gross negligence", this mistake could not be characterized as an intentional fault (para. 207). He added that the "particular structure of the [C]ontract, [which required] extensive involvement of both the service provider and the client in implementing the . . . system", meant that a gross fault could not be attributed to Createch (para. 208).

[18] He also found that the Contract, having resulted from discussions between the parties, could not be characterized as a contract of adhesion. It was a synallagmatic

contract — more precisely a time and materials contract for services — under which Createch had an obligation of means. Having been negotiated by mutual agreement between sophisticated legal persons, the Contract was not subject to consumer protection legislation.

[19] The limitation of liability clause in the Contract was nevertheless inoperative, because Createch had breached its fundamental obligation, that is, [TRANSLATION] “to properly identify and propose management software and a development approach suited to Prelco’s situation such that the integrated management system would be fully operational” (paras. 213 and 220-25). Having misunderstood “the scale and complexity of Prelco’s operations”, Createch had committed a fault in its initial choice as to the approach to take in implementing the management system and had as a result breached its fundamental obligation (para. 215). Because of this erroneous initial choice, Createch had not understood that the system required indexes, which was a “fundamental error” whose effect had been to cause the system to freeze for several minutes when tables were being consulted (para. 225).

[20] Citing certain academic commentary and judicial decisions in this regard, the trial judge explained that [TRANSLATION] “there is now a view in our civil law that a non-liability clause becomes inoperative in the event of a breach of a fundamental obligation by the party who benefits from that clause” (para. 210). He added, in a comment he himself described as being in *obiter*, that the obligation of good faith

flowing from arts. 6, 7 and 1375 *C.C.Q.* could also serve as a basis for his conclusion that the doctrine applies to the facts of this case (para. 226).

[21] The trial judge nevertheless found that liability for the damages claimed by Prelco could not lie completely with Createch, although the latter did bear the greatest share of that liability. Prelco had had human resource problems and, like Createch, had minimized the risk related to its employees' lack of training and preparation when they had jointly decided to launch the system. The trial judge therefore apportioned liability between them, ascribing 60 percent to Createch and 40 percent to Prelco.

[22] Regarding Prelco's claims, the trial judge began by rejecting the one for an overpayment of \$1,567,325, finding that Prelco had not paid unnecessarily for the software and services provided by Createch. After the work done by Irisco, he observed, [TRANSLATION] "the NAV system functioned and was used by Prelco" (para. 233). If the items "software" and "maintenance" were excluded, he stated, Prelco had not shown "what portion of the \$1,520,000 represented unnecessary work from which Prelco does not now benefit" (*ibid.*). However, the trial judge accepted Prelco's claim for \$79,200 for fees paid to Irisco. Because those fees resulted from Createch's error in its choice for the approach to implementation, he did not apportion liability.

[23] As to the claims from customers and loss of profits on sales made and lost by Prelco, the trial judge apportioned liability and fixed the amounts payable to that company at \$189,200 and \$1,935,000 respectively. Because he had found that the

integrated management system functioned and was being used by Prelco, he rejected Prelco's principal argument and granted Createch's cross-application.

[24] The trial judge ultimately ordered Createch to pay Prelco \$2,203,400 in damages. However, because he was granting Createch's cross-application in the amount of \$331,134, he effected compensation between the two claims. The result of compensation was that the amount Createch owed Prelco was \$1,872,266.

B. *Quebec Court of Appeal, 2019 QCCA 1457 (Chamberland, Bélanger and Rancourt J.J.A.)*

[25] Createch appealed the Superior Court's judgment. In Createch's view, the trial judge had erred in finding that the limitation of liability clause in the Contract was inoperative because it had breached a fundamental obligation. Prelco initiated an incidental appeal, submitting that the trial judge had made several errors in calculating the damages related to its share of liability, the value of the services delivered by Createch and the amount representing lost sales.

[26] The Court of Appeal dismissed Createch's appeal, holding unanimously that the mere fact that a breach relates to a fundamental obligation can suffice for the doctrine of breach of a fundamental obligation to neutralize an exoneration clause or limitation of liability clause. It concluded that the doctrine applies in a case such as the one before it. The court began by noting that exoneration clauses and limitation of liability clauses relating to material injury caused to another are valid in Quebec civil

law, but that, in the words of the first paragraph of art. 1474 *C.C.Q.*, no one may rely on such a clause to exclude or limit his or her liability “for material injury caused to another through an intentional or gross fault”.

[27] Furthermore, the Court of Appeal did not accept Createch’s argument that the rejection of the common law doctrine of “fundamental breach” in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, barred Prelco’s claim. In the Court of Appeal’s view, the doctrine of breach of a fundamental obligation is not solely a common law rule, but is also a creation of the Quebec courts drawn from civil law commentary and jurisprudence. *Tercon* is therefore of no consequence in the case at bar, because this means of neutralizing non-liability clauses has an independent legal basis that is proper to the civil law. Nor does this development represent [TRANSLATION] “an isolated case of judicial creation” (C.A. reasons, at para. 25 (CanLII)), as it brings to mind principles developed by this Court in other contexts, such as in *National Bank of Canada (Canadian National Bank) v. Soucisse*, [1981] 2 S.C.R. 339, at pp. 359-63, and *Montréal (Ville) v. Lonardi*, 2018 SCC 29, [2018] 2 S.C.R. 103, at para. 85.

[28] The Court of Appeal noted that the Quebec courts and several authors have recognized that the doctrine applies in a commercial context such as this. It referred to a number of principles to justify the existence of what it described as the [TRANSLATION] “rule of . . . fundamental obligation” for finding that the clause is invalid, including “commutative justice”, flexible application of gross fault,

“reciprocity of obligations” and “total absence of cause of the obligation” (para. 39, citing D. Lluelles and B. Moore, *Droit des obligations* (3rd ed. 2018), at No. 2980).

[29] The Court of Appeal therefore concluded that the trial judge had not erred in finding that the non-liability clause was inoperative for the purposes of art. 1438 *C.C.Q.*, as the clause affected a fundamental obligation of the Contract (para. 41). The court explained that the question was whether the clause [TRANSLATION] “drains the contract of its essential effect or paralyzes the fundamental obligation” (para. 45). To apply the clause in the instant case would, when all is said and done, amount to allowing Createch “to free itself from its fundamental obligation and would strip the [C]ontract of its essential effect” (para. 49). The Court of Appeal dismissed the incidental appeal on the basis that the trial judge had made no palpable and overriding error with respect to the three grounds that were raised.

IV. Issue

[30] The issue in this case is a question of law: Can Createch’s failure to perform a fundamental obligation of the Contract render cl. 7 of this contract inoperative? This question cannot be dissociated from the legal context of the case: Createch’s breach of an obligation of means was a simple fault and not a gross or intentional fault. This contractual fault caused material injury and not bodily or moral injury. The clause on which Createch relies is in a contract by mutual agreement that was negotiated by two sophisticated legal persons and not in a contract of adhesion or a consumer contract. Does the doctrine of breach of a fundamental obligation — which unquestionably

forms part of Quebec law in certain legal contexts — apply to the fault committed by Createch so as to negate cl. 7 of the Contract?

[31] It bears noting that we will be using the generic term “non-liability clause” to refer to a clause “by which the parties agree in advance to exclude or limit the debtor’s liability resulting from the non-performance of an obligation” (*Private Law Dictionary and Bilingual Lexicons* (2nd ed. 1991), by P.-A. Crépeau, ed., at p. 288). To distinguish a clause that excludes liability from one that limits it, we will use, for the former, “exoneration clause” and, for the latter, “limitation of liability clause”; where the distinction between the two is of no consequence for our purposes, we will use the term “non-liability clause”. Although theoretically distinct, these clauses are often dealt with together both in legislation and by judges and academic commentators (see, e.g., art. 1474 *C.C.Q.*, and the explanations in J. E. C. Brierley and R. A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (1993), at No. 523).

V. Arguments of the Parties

[32] Createch argues that the doctrine of breach of a fundamental obligation cannot apply in the context of a contract by mutual agreement, submitting that [TRANSLATION] “it would be inconsistent to disallow an exoneration clause merely because it affects the ‘*essence of the contract*’” (A.F., at para. 38 (emphasis in original)). Although the doctrine is relevant in certain cases of abuse of bargaining power or imbalance between contracting parties that have been identified by the

legislature, Createch asserts that it cannot apply in this case and that the opposite conclusion would be contrary to the scheme of the *Code*. Even though its fault in this case relates to a fundamental obligation, Createch points out that the Contract contains a limitation of liability clause and that such clauses have been considered valid in Quebec law since the end of the 19th century. The legislature has thus left the parties free to limit, or even to completely exclude, contractual liability in the name of autonomy of the will, a principle that was retained in the *Civil Code of Québec*, provided that such limitation or exclusion is not otherwise prohibited by law. To exclude one's liability for a simple fault by contract "is not contrary to public order" (A.F., at para. 37, fn. 52) where what is at issue is the apportionment of risk in a complex commercial contract that has been negotiated freely, because there is no inequality or unfairness to correct.

[33] Createch adds that the clause in question does not deprive the obligation of its cause. Quoting various academic commentators, Createch submits that the concept of cause of the obligation [TRANSLATION] "would be relevant only if the clause denied the creditor any remedy in the event of nonperformance" (A.F., at para. 64 (emphasis deleted), quoting Lluelles and Moore, at No. 2980). What is more, to relax the concept of gross fault would be contrary to the definition set out in art. 1474 *C.C.Q.*, and such a conclusion would at any rate be inconsistent with the trial judge's findings of fact.

[34] Prelco counters that the doctrine justifies the trial judge's conclusion that a non-liability clause that applies to a fundamental obligation is inoperative for that

reason alone. Prelco proposes, citing, among others, *Cie Immobilière Viger Ltée v. Giguère Inc.*, [1977] 2 S.C.R. 67, that despite the *Code*'s apparent silence, this rule drawn from the decided cases and the academic literature applies to contracts by mutual agreement as much as to contracts of adhesion or consumer contracts. There was nothing wrong with the conclusion of the courts below, as a contract clause cannot be used to [TRANSLATION] "change the nature of the contract" by removing "its entire substance" (transcript, at p. 69). Not only is there nothing in the *Code* to bar this rule developed by the courts and authors, but a number of its provisions in fact represent a basis for the doctrine on which the trial judge and the Court of Appeal relied in the instant case.

[35] First, Prelco argues that the justification for the doctrine according to which a non-liability clause is invalid in the event of a breach of a fundamental obligation can be found in the foundations of the Quebec law of obligations, including the duty to honour one's contractual undertakings (art. 1458 *C.C.Q.*). Second, it submits that various concepts of our civil law confirm that the doctrine exists and is legitimate, including the principle of reciprocity of obligations (arts. 1378, 1380 and 1381 *C.C.Q.*), those of good faith and equity in contractual relations (arts. 6, 7, 1375 and 1434 *C.C.Q.*), and the concept of cause of the obligation (art. 1371 *C.C.Q.*). Third, it argues that coherence in contracting, one of the principles on which the doctrine is based, requires that any non-liability clause whose effect would be to strip the contract of its purpose be annulled (art. 1427 *C.C.Q.*).

VI. Applicable Legal Framework

[36] For the reasons that follow, and with respect, we are of the view that the clause should be found to be valid despite the breach of a fundamental obligation alleged against Createch. First, clauses like this one are permitted by the *Code*, and none of the circumstances in which the legislature has provided that such a clause would be invalid on the basis of public order — what is known as “legislative” or “formal” public order — apply in this case. Although the general law does allow for the evolution of the concept of public order through judicial action — what is known as “judicial” or “virtual” public order — there is every reason to believe that the scheme of the *Code* excludes such an innovation for the clause at issue here (on the distinction between legislative public order and judicial public order, see Lluelles and Moore, at No. 1905). Second, it is true that certain clauses, such as a no obligation clause (*clause de non-obligation*) that negates or excludes all of the debtor’s obligations, can have the effect of depriving an obligation of its cause and impairing its validity. However, a non-liability clause does not by its nature have the effect of negating obligations. It is noteworthy that there are authors who argue that an exoneration clause can in some cases be likened to a no obligation clause that deprives the obligation of its cause if the effect of the clause is not only to exclude damages claims, but also to release the debtor from any obligation to the creditor. This position certainly does not lack a theoretical basis, but it is not exempt from criticism either. In any event, as we will see, it does not apply in this case, because that is not the effect of the non-liability clause at issue here.

[37] We propose to consider the various arguments raised by the parties with respect to the two possible legal bases for the doctrine of breach of a fundamental obligation in two steps: (a) validity of the clause having regard to public order; and (b) validity of the clause having regard to the requirement relating to the cause of the obligation.

A. *The Non-liability Clause Is Inoperative Because It Violates a Rule of Public Order*

[38] It is not disputed that the doctrine of breach of a fundamental obligation applies in Quebec positive law, in relation to consumer contracts and contracts of adhesion in particular as is expressly provided for in art. 1437 *C.C.Q.* In specific contexts in which one or the other of these types of contracts is involved, the legislature has departed from the principle of autonomy of the will in order to neutralize “abusive” clauses that are excessively and unreasonably detrimental to the other party, a consumer or adhering party. Article 1437 para. 2 *C.C.Q.* characterizes as abusive a clause which so departs from the fundamental obligations that it changes the nature of the contract. However, this appeal is instead concerned with determining the scope of the doctrine in a context other than that of consumer contracts, in relation to a contract whose clauses were negotiated freely and could accordingly be the subject of mutual concessions by the parties.

[39] It is common ground that non-liability clauses are valid in principle. This rule, originally stated by this Court in *obiter* in *The Glengoil Steamship Co. v.*

Pilkington (1897), 28 S.C.R. 146, was subsequently, despite some hesitation, accepted in positive law, with the effect that its place is now certain (Lluelles and Moore, at No. 2969). The validity in principle of non-liability clauses is based on autonomy of the will and its corollary, freedom of contract, both of which are general principles of the general law of obligations. It is clear that the principle of freedom of contract itself [TRANSLATION] “is not expressed as such in the Civil Code”, but that it has, as a basis and also as its principal limit, the free exercise of civil rights circumscribed by public order (J. Pineau, D. Burman and S. Gaudet, *Théorie des obligations* (4th ed. 2001), by J. Pineau and S. Gaudet, at No. 156, inferring the principle from art. 9 C.C.Q.). In our view, the modern principle that freedom of contract is subject to public order informs the general law of obligations as a general principle of law within the meaning of the preliminary provision of the *Code* (see J. Pineau, “La philosophie générale du Code civil”, in *Le nouveau Code civil: interprétation et application — Les journées Maximilien-Caron 1992* (1993), 269, at p. 285).

[40] The validity in principle of non-liability clauses is subject to the same limits established in the *Civil Code of Québec* with respect to public order. Although the principles from *Glengoil* are not explicitly stated in the *Code* either, they might be thought to have been reaffirmed in it through the modern principle of freedom of contract even though their scope has been limited further by the broader role conferred on mandatory rules in contract matters (Lluelles and Moore, at Nos. 1809 and 2969). It might also be said that the validity in principle of such clauses is implicitly recognized by the effect of arts. 1474 and 1475 C.C.Q. (see J.-L. Baudouin and P.-G. Jobin, *Les*

obligations (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 868; P.-A. Crépeau, “La fonction du droit des obligations” (1998), 43 *McGill L.J.* 729, at pp. 759-62).

[41] In *Glengoil*, Taschereau J., while noting that such clauses are not, in principle, contrary to public order, held that they must be construed strictly (pp. 158-59). Any ambiguity must be resolved in favour of the exercise of the right to exact performance by equivalence as reparation for an injury (see Lluelles and Moore, at Nos. 2969 and 2986; C. Masse, “Civil Liability (Law of Obligations III)”, in *Reform of the Civil Code*, vol. 2-B, *Obligations III, V, VI* (1993), at No. 94; Jobin and Vézina, at No. 875; F. Levesque, *Précis de droit québécois des obligations: contrat, responsabilité, exécution et extinction* (2014), at No. 493). Parties are thus free to stipulate non-liability clauses, provided of course that the other conditions relating to the validity of the contractual obligation are satisfied.

[42] The validity in principle of non-liability clauses is, however, limited by legislative and judicial public order (aside from *Glengoil*, at p. 158, see, e.g., *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, at paras. 61-62; *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 43-46; *Garcia Transport Ltée v. Royal Trust Co.*, [1992] 2 S.C.R. 499; Lluelles and Moore, at Nos. 1907-8 and 1914). In private law, respect for public order is set up as a mandatory rule of general application (see arts. 8 and 9 *C.C.Q.*).

[43] In the context in question here, the principle of freedom of contract as a basis for the validity in principle of non-liability clauses is confirmed implicitly in art. 1474 *C.C.Q.*:

1474. A person may not exclude or limit his liability for material injury caused to another through an intentional or gross fault; a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence.

He may not in any way exclude or limit his liability for bodily or moral injury caused to another.

[44] The legislature has set out exceptions to the modern conception of this principle. Taking a cautious attitude, it provided that a notice stipulating exclusion from or limitation of contractual liability has effect with respect to the creditor only if the party who invokes the notice proves that the other party was aware of its existence at the time the contract was formed (art. 1475 *C.C.Q.*). Article 1474 *C.C.Q.*, a provision for which there was no equivalent in the *Civil Code of Lower Canada* (J. Pineau, “Theory of Obligations”, in *Reform of the Civil Code*, vol. 2-A, *Obligations I, II*, at No. 176), also sets limits in the name of public order, but it does not refer to the fundamental obligation concept.

[45] First of all, the first paragraph of art. 1474 *C.C.Q.*, by prohibiting non-liability clauses where there is gross or intentional fault, discourages recklessness, fraud, negligence and deliberate faults (see Lluelles and Moore, at No. 2975; Jobin and Vézina, at No. 870; *Djamad v. Banque Royale du Canada*, 2021 QCCA 371, at paras. 46-49 (CanLII); *Audet v. Transamerica Life Canada*, 2012 QCCA 1746, [2012]

R.J.Q. 1844, at paras. 90-91). This paragraph codifies a well-established moralizing trend in the jurisprudence that relates to the nature of the debtor's conduct rather than directly to the creditor's vulnerability (Lluelles and Moore, at Nos. 2975 and 2976; Jobin and Vézina, at No. 870). We would add that the paragraph's wording suggests that this limit on freedom of contract applies even in contracts by mutual agreement such as the one at issue in the case at bar. Even in a freely negotiated agreement, the parties cannot circumvent it. This means that the debtor cannot rely on a non-liability clause after deliberately refusing to perform his or her obligation (Lluelles and Moore, at No. 2975).

[46] Next, the second paragraph of art. 1474 *C.C.Q.* relates to the nature of the injury, reflecting a legislative policy of public order that is distinct from the one being applied in the first paragraph and is focused on protecting the human person (Lluelles and Moore, at No. 2971; É. Cossette-Lefebvre, "Chronique — Plaidoyer en faveur du rejet de la 'théorie de l'obligation essentielle' en droit civil québécois: critique de l'arrêt 6362222 Canada inc. c. Prelco inc., 2019 QCCA 1457, à la lueur du droit comparé", *Repères*, November 2020 (available on La référence), at No. 14; N. Vézina, "Préjudice matériel, corporel et moral: variations sur la classification tripartite du préjudice dans le nouveau droit de la responsabilité" (1993), 24 *R.D.U.S.* 161, at p. 171; Pineau, "La philosophie générale du Code civil", at p. 284). The legislature thus made it clear that, regardless of the seriousness of the fault and despite the principle of freedom of contract, no one may exclude or limit his or her liability for bodily or moral injury. These are examples that come within public order of direction — a principle "the

purpose of which is to regulate the economy in the general interest of society either by restricting contractual freedom or, less frequently, by reinstating it” — and necessitate the absolute nullity of incompatible clauses (*Private Law Dictionary and Bilingual Lexicons — Obligations* (2003), by P.-A. Crépeau, ed., at p. 246, “public order of direction”).

[47] As for art. 1437 *C.C.Q.*, it sets a limit that is of public order of protection, that is, one the purpose of which is to protect a contracting party who is presumed to be economically weaker:

1437. An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.

An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore contrary to the requirements of good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause.

[48] This article expressly recognizes the application of the doctrine of breach of a fundamental obligation in Quebec civil law where there is an abusive contract clause, but limits it to consumer contracts (defined in art. 1384 *C.C.Q.*) and contracts of adhesion (art. 1379 *C.C.Q.*), which are characterized by an imbalance between the parties. In accordance with this legislative basis for the doctrine, which falls under public order of protection, an exoneration clause or limitation of liability clause that would otherwise be permitted will be invalid if it relates to a fundamental obligation (see, e.g., V. Karim, *Les obligations* (5th ed. 2020), vol. 1, at Nos. 2315-19, 2288

and 3909; Masse, at No. 96; S. Ghozlan, “La notion d’obligation essentielle dans le cadre du contrôle des clauses abusives: Étude des systèmes juridiques français et québécois” (2015), 49 *R.J.T.U.M.* 399, at pp. 413-16 and 434-40; Cossette-Lefebvre, at No. 39; *Ferme Franky 2004 inc. v. Gestions Pierre Saint-Cyr inc. (Centrale de contrôle d’alarmes du Québec)*, 2014 QCCA 848, at para. 3 (CanLII)).

[49] The existence of the rule of nullity of abusive clauses in consumer contracts and contracts of adhesion indicates — out of a concern for protecting contracting parties who are considered to be at a disadvantage — that these two types of contractual relationships do not fully favour the realization of the ideal of contractual fairness based on absolute autonomy of the will. In accordance with this exceptional treatment of consumer contracts and contracts of adhesion, a clause that departs from the fundamental obligations of a contract to such an extent that it changes the nature of the contract is considered to be abusive, and therefore null. This limit on the validity of non-liability clauses is in addition to art. 1474 *C.C.Q.*, the effects of which are not confined to the specific context of consumer contracts or contracts of adhesion (S. Grammond, A.-F. Debruche and Y. Campagnolo, *Quebec Contract Law* (3rd ed. 2020), at No. 361).

[50] The validity or effectiveness of a non-liability clause is also open to challenge in other cases specified by the legislature in relation to nominate contracts (Jobin and Vézina, at No. 868; Lluelles and Moore, at No. 2970; Levesque, at No. 488; P.-G. Jobin and M. Cumyn, *La vente* (4th ed. 2017), at No. 201). This is true of, among

others, a contract of lease in the residential context (arts. [1863](#), [1893](#) and [1900](#) para. 1 *C.C.Q.*; *Karrum Realities Inc. v. Ama Investments Inc.*, 2007 QCCA 880, at para. 35 (CanLII); 9092-3335 *Québec inc. v. 4364856 Canada inc.*, 2019 QCCS 3666, at para. 35 (CanLII)), a contract of sale (arts. [1732](#) and [1733 C.C.Q.](#); *Association pour la protection des automobilistes inc. v. Toyota Canada inc.*, 2008 QCCA 761, [2008] R.J.Q. 918, at para. 34), carriage (art. [2070 C.C.Q.](#)) or employment (art. [2092 C.C.Q.](#); *Quebec (Commission des normes du travail) v. Asphalte Desjardins inc.*, 2014 SCC 51, [2014] 2 S.C.R. 514, at para. 53), or a deposit with an innkeeper (art. 2298 *C.C.Q.*). It is also true of a consumer contract as a result of s. 10 of the *Consumer Protection Act*, CQLR, c. P-40.1 (N. L'Heureux and M. Lacoursière, *Droit de la consommation* (6th ed. 2011), at Nos. 60 and 71). But these provisions constitute specific rules adopted by the legislature to govern certain nominate contracts, and not the implementation of a rule of general application.

[51] Because these various legislative provisions are each tailor-made to apply to the needs of a specific nominate contract, their effect is often to render all non-liability clauses inoperative, but some of them instead regulate the extent to which one may resort to such clauses. In all these cases, however, the purpose of the limit placed on freedom of contract is to protect parties who are weak or at a disadvantage economically. We would reiterate that the *Code* provides for no like rule of general application that falls under public order of protection, including one relating to a breach of a fundamental obligation. In other words, if an impugned clause has been freely negotiated, is compatible with the constraints provided for in arts. 1474 and 1475

C.C.Q. and is not specifically regulated, it cannot be excluded on the basis of legislative public order. The legislature also set out mandatory rules of liability that parties cannot avoid by contract (see, e.g., art. 2118 *C.C.Q.*; J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, vol. 2, *Responsabilité professionnelle* (9th ed. 2020), at No. 2-257; J. Deslauriers, *Vente, louage, contrat d'entreprise ou de services* (2nd ed. 2013), at Nos. 2475-77; V. Karim, *Contrats d'entreprise (ouvrages mobiliers et immobiliers: construction et rénovation), contrat de prestation de services (obligations et responsabilité des professionnels) et l'hypothèque légale* (4th ed. 2020), at No. 1639).

[52] Furthermore, the policy adopted in Quebec civil law with respect to lesion, as codified in the reform of the *Civil Code of Québec*, which came into force in 1994, confirms the importance attached to autonomy of the will in this context. The restrictions imposed on freedom of contract in the case of lesion, like those set out in art. 1437 *C.C.Q.*, have only a targeted purpose. Article 1405 *C.C.Q.* provides that lesion vitiates consent only with respect to minors and protected persons of full age (see P.-G. Jobin, “L’étonnante destinée de la lésion et de l’imprévision dans la réforme du code civil au Québec”, [2004] *R.T.D. civ.* 693). Although the Civil Code Revision Office proposed the enactment of a provision of general application with respect to lesion, the *Code*’s provisions instead give preference to the principle of autonomy of the will and to the [TRANSLATION] “stability of business relations” when it comes to contractual relationships between unprotected persons of full age (J. Pineau, “La philosophie générale du nouveau Code civil du Québec” (1992), 71 *Can. Bar Rev.* 423,

at pp. 438-39; Lluelles and Moore, at No. 880; M. Lemieux, “Les clauses abusives dans les contrats d’adhésion” (2000), 41 *C. de D.* 61, at pp. 64 and 76-82).

[53] In other words, the principle of freedom of contract ensures, for the general law of contracts, contractual fairness absent express exceptions. In rare circumstances, an unprotected person of full age may invoke lesion where that is permitted by law (e.g., with respect to partition of the family patrimony (art. 424 *C.C.Q.*) or to a loan of money (art. 2332 *C.C.Q.*). At first blush, therefore, we remain in the [TRANSLATION] “free zone” in which freedom of contract is not limited by public order (Pineau, “La philosophie générale du nouveau Code civil du Québec”, at p. 439). As the Court explained in *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101, “restrictions on consensualism generally take the form of exceptions and specific rules” (para. 102).

[54] We accept Createch’s view that this permissive approach in Quebec law to the validity of a non-liability clause where there is a breach of a fundamental obligation is to some extent echoed in this Court’s decisions in cases originating in the common law provinces. Createch points in particular to how the courts have treated the analogous concept, the doctrine of “*fundamental breach*”, a judge-made criterion that was formerly used as a substantive rule to be applied in order to declare that a non-liability clause was inoperative (*Tercon*, at para. 106, citing *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936 (C.A.)). Developments in the common law are of course not determinative of our analysis, given that any answer to the question raised

in this appeal must be based on the principles of Quebec civil law (see, e.g., *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461, at para. 85). We would add that the Court of Appeal was right to suggest that, where the sources of the law are concerned, the civil law doctrine of breach of a fundamental obligation has a history of its own that is shaped by Quebec's legislation, jurisprudence and academic commentary and is not dictated by sources from other jurisdictions (paras. 24-25). Nevertheless, this consideration of the common law remains relevant to Quebec law for the purpose of determining how the civil law doctrine gives way to freedom of contract, while at the same time abiding by principles whose purpose is to protect vulnerable parties.

[55] As long ago as 1989, in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, Dickson C.J. had referred to the principle drawn from the academic commentary that not all exclusion clauses are unreasonable, and stressed that the common law doctrine of fundamental breach must take this reality into account. Dickson C.J. noted that in the commercial context, such clauses “are negotiated as part of the general contract” (p. 461) and that they can therefore reflect gains or concessions that sophisticated parties considered fair in the circumstances. Rather than systematically attacking such clauses, he wrote, “there is much to be gained by addressing directly the protection of the weak from over-reaching by the strong” (p. 462). In *Tercon*, the Court laid “to rest” the generalized application of this common law doctrine of fundamental breach (paras. 62 and 81). Binnie J., writing for the Court on this point, broke the new analytical approach for non-liability clauses down into three distinct stages: (1) the clause must be interpreted in order to determine whether it

applies to the circumstances established in evidence; (2) it must be asked whether “the . . . clause was unconscionable at the time the contract was made, ‘as might arise from situations of unequal bargaining power between the parties’”; and (3) if the clause is held to be applicable and valid, it must be asked whether it is nonetheless inoperative “because of the existence of an overriding public policy” (paras. 122-23, quoting *Hunter*, at p. 462; see also J. D. McCamus, *The Law of Contracts* (3rd ed. 2020), at pp. 893-94). Thus, to repeat the principle stated in *Hunter*, “[e]xplicitly addressing concerns of unconscionability and inequality of bargaining power allows the courts to focus expressly on the real grounds for refusing to give force to a contractual term said to have been agreed to by the parties” (p. 462).

[56] While we will go no further in attempting to reconcile the different approaches of the two traditions, it thus follows that at common law, as in civil law, there is a concern with specific situations of abuse and contractual imbalance as well as with other cases that are contrary to public order, or are matters of “public policy”, but at the same time an acceptance that a non-liability clause in a freely negotiated contract can be a fair solution having regard to the context of the negotiations. It can therefore be said that neither of the two legal traditions has a rule of general application that totally prohibits non-liability clauses relating to fundamental obligations in contracts between sophisticated parties (see S. Grammond, “La règle sur les clauses abusives sous l’éclairage du droit comparé” (2010), 51 *C. de D.* 83, at p. 109).

[57] Is it nonetheless possible that the general law of obligations includes limits based on public order that are not set out in the *Civil Code of Québec*? In other words, is there a [TRANSLATION] “new restriction” (Lluelles and Moore, at No. 2978) on the principle of autonomy of the will — one that is imperative — that concerns breaches of fundamental obligations and whose purpose is to protect the general interest of society or economically weaker contracting parties? As we explained above, it is not for the legislature alone to articulate rules of public order that limit freedom of contract. The development of judicial public order is of course a matter for the courts: in some circumstances a court might hold that a provision enacted by the legislature is mandatory, while in others it might articulate a new legal principle as a rule of public order (*Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570 (per Baudouin J.A.), aff’d [1997] 3 S.C.R. 844; Jobin and Vézina, at No. 100; Lluelles and Moore, at No. 1922). Given that the rule that non-liability clauses are valid in principle is itself not explicitly stated in the *Code*, the question whether or not a rule regarding breaches of fundamental obligations exists is equally relevant.

[58] As the parties agree, it is a well-known fact that innovations by judges and authors are not unknown in the civil law, and as Beetz J. put it in a comment that has been repeated many times, “[t]he *Civil Code* does not contain the whole of civil law” (*Viger*, at p. 76; see, e.g., *Bank of Montreal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429, at p. 442; *Ostiguy v. Allie*, 2017 SCC 22, [2017] 1 S.C.R. 402, at para. 73; P.-G. Jobin, “La Cour suprême et la réforme du Code civil” (2000), 79 *Can. Bar Rev.* 27, at p. 36). Under the former *Code*, the bulk of the general law with respect to non-liability clauses

consisted of principles created by the courts and by authors (J.-L. Baudouin and P. Deslauriers, *La responsabilité civile*, vol. 1, *Principes généraux* (7th ed. 2007), at No. 1-1375). At that time, the enactment of provisions relating to such clauses in certain specific contexts did not deprive the courts of their power to intervene in this regard (B. Moore, “Les clauses abusives: Dix ans après” (2003), 63 *R. du B.* 59, at pp. 63-64).

[59] But does the principle stated in *Viger* authorize the judiciary to extend the application of the doctrine of breach of a fundamental obligation to freely negotiated contracts by mutual agreement between sophisticated legal persons on the basis of public order in the case at bar? In our view, the answer to this question must be no.

[60] It should be mentioned that certain authors cited by the Court of Appeal in its reasons in this case have expressed reservations regarding such an extension of the doctrine through judicial public order. Lluelles and Moore are of the opinion that the provisions of legislative public order are sufficient in this regard (Nos. 2978-79). They note that art. 1437 *C.C.Q.* and art. 1474 *C.C.Q.* can be used to remedy abuse (*ibid.*). In the latter case, although the characterization of gross fault must be focused on the debtor’s conduct (Lluelles and Moore, at No. 2976; Jobin and Vézina, at No. 870), nonperformance of a fundamental obligation could be relevant to the analysis on characterization of the debtor’s fault (see, e.g., *Poissonnerie Bari v. Gestion Inter-parc Inc. (National Tilden)*, 2002 CanLII 111 (Que. Sup. Ct.), at paras. 20-23; C. Deslauriers-Goulet, “L’obligation essentielle dans le contrat” (2014), 55 *C. de D.* 923, at p. 947).

[61] Furthermore, Lluelles and Moore stress that extending the doctrine would — on the basis of the concept of cause of the obligation, to which we will return below, and not, strictly speaking, on the basis of public order — be relevant [TRANSLATION] “if the clause denied . . . any remedy” (No. 2980; see also No. 1831). Moreover, a number of authors note that the legislature’s rejection of rules with respect to lesion between unprotected persons of full age and unforeseeability show that its intention was to bar the courts from intervening on the basis of [TRANSLATION] “substantive unfairness” (Grammond, at p. 98; see also Lluelles and Moore, at No. 1064.5; Cossette-Lefebvre, at No. 41). They conclude that freedom of contract should continue to apply, absent a gross or intentional fault, to any contract that is neither a contract of adhesion nor a consumer contract (Lluelles and Moore, at No. 2981).

[62] It might be thought that the legislature spoke directly to the purpose of the concept of public order — both of direction and of protection — and intervened to *validate* the use of non-liability clauses in cases to which art. 1437 *C.C.Q.* does not apply. Indeed, at the time of the reform of the *Civil Code*, the legislature chose to target contracts of adhesion and consumer contracts and to disregard contracts by mutual agreement, an approach that has led to some criticism; for example, Professor Jobin and Professor Vézina write that [TRANSLATION] “consumer contracts and contracts of adhesion are not alone in having abusive clauses, and contractual fairness should in our opinion be universal” (No. 140).

[63] The Civil Code Revision Office put forward an argument resembling the one advanced by these authors (*Report on the Québec Civil Code*, vol. I, *Draft Civil Code* (1978), at p. 343, and vol. II, t. 2, *Commentaries*, at p. 614). However, not only was this conception of contractual fairness not codified in relation to freely negotiated contracts (Cossette-Lefebvre, at No. 41; É. Charpentier, “Pour une interprétation (très) large de l’article 1437 du *Code civil du Québec*”, in B. Moore, ed., *Mélanges Jean-Louis Baudouin* (2012), 255, at p. 267), but the legislature deliberately indicated its preference for freedom of contract in this context throughout the *Code* (see P.-G. Jobin, “La révision du contrat par le juge dans le Code civil”, in E. Caparros, ed., *Mélanges Germain Brière* (1993), 400, at pp. 410-11).

[64] The scheme of the *Code* thus reveals a conscious decision by the legislature to strike a balance between the concept of public order and the principle of freedom of contract. Subject to the constraints provided for in art. 1474 *C.C.Q.*, a person may exclude or limit his or her liability for material injury caused to another through a fault that is neither intentional nor gross. In addition, art. 1475 *C.C.Q.* shows that the legislature, far from being silent on the subject, has permitted the use of such clauses in the name of freedom of contract in the event of material injury, although it has imposed certain limits. We would reiterate that these articles draw no distinction between exoneration clauses and limitation of liability clauses. The breach of a fundamental obligation is seen as a form of abuse only in the context of consumer contracts and contracts of adhesion under art. 1437 *C.C.Q.* Another basis for this freedom to agree on risk sharing in contracts by mutual agreement can be found in

arts. 1613 and 1622 *C.C.Q.*, which confirm that the parties may foresee and stipulate the damages for which they will be liable in the event of nonperformance. Regardless of whether an obligation is fundamental or accessory, the parties can agree on damages at the time of formation of the contract, and a court can give effect to such an agreement even if the debtor has committed a simple fault.

[65] It would therefore be difficult to say that a party is acting in bad faith merely because he or she is seeking to apply a non-liability clause in a contract that was freely negotiated on equal terms. Moreover, the presumption of good faith (art. 2805 *C.C.Q.*) is one more basis for asserting that a contracting party may take advantage of such a clause if he or she has not committed an intentional or gross fault. The fact that the person who takes advantage of a non-liability clause has committed a fault does not in itself justify a finding of bad faith on that person's part. It is true that art. 1437 para. 2 *C.C.Q.* establishes a connection between non-liability clauses and good faith. In the context in which that paragraph applies, it can be said that the creditor's good faith is open to question because of the contractual imbalance, as it is assumed in that exceptional situation that the clause is "excessively and unreasonably" detrimental to the creditor (art. 1437 *C.C.Q.*; compare art. 7 *C.C.Q.*).

[66] It should also be mentioned that in a different situation, one in which the non-liability clause affected only an accessory obligation, the commercial and social utility of excluding or limiting one's liability in a freely negotiated contract would be compromised. From a risk management perspective, non-liability clauses take on their

full significance in relation to the principal obligation to be performed. As Carole Aubert de Vincelles points out, [TRANSLATION] “[R]isk management, which is necessary to every contracting strategy, and correlatively to every commercial management strategy, cannot be conducted without limitation of damages clauses (*clauses limitatives de réparation*)” (“Plaidoyer pour un affinement réaliste du contrôle des clauses limitatives de réparation portant sur les obligations essentielles”, [2008] *R.D.C.* 1034, at No. 9).

[67] Thus, the *Code* provides for a set of limits and prohibitions that are applicable to non-liability clauses in the context of nominate contracts, but includes no analogous express restriction of general application. The limits and prohibitions that are expressly provided for in the *Code* apply to situations of inequality between contracting parties or are based on other rules of public order deemed to be pertinent by the legislature. Aside from these situations, and of course subject to other mandatory rules that are of no consequence here, the general law of obligations leaves the contracting parties free to apportion the risk of nonperformance between them.

[68] Although our analysis of the scheme of the *Civil Code of Québec* is determinative of this first ground of appeal, we nevertheless feel that it would be helpful to say a few words about the Quebec cases concerning the questions raised by this ground. Aside from the fact that the legislative context of the *Civil Code of Lower Canada* was very different, it should be noted that in the cases mentioned by authors and cited by the Court of Appeal in this case to justify a generalized application of the

doctrine, this was discussed only in *obiter*. In most of the cases in which the doctrine has been raised, the courts reached their decisions on the basis either of the requirement of proving knowledge of the non-liability clause or of the concept of gross fault, that is, of concrete cases raising concerns of public order (see *Conseil des ports nationaux v. Swift Canadian Co. Ltd.*, [1953] B.R. 730; *Southern Canada Power Co. Ltd. v. Conserverie de Napierville Ltée*, [1967] B.R. 907; *Western Assurance Co. v. Desgagnés*, [1976] 1 S.C.R. 286, at p. 289; *Fenêtres St-Jean Inc. v. Banque Nationale du Canada* (1990), 69 D.L.R. (4th) 384 (Que. C.A.); *Impact Graphics Ltd. v. B.P.G. Central Security Corp.*, [1995] AZ-95021939 (Que. Sup. Ct.); *Empire Cold Storage Co. Ltd. v. La Cie de Volailles Maxi Ltée*, 1995 CanLII 4828 (Que. C.A.); *BNP Paribas (Canada) v. Ikea Property Ltd.*, 2005 QCCA 297, [2005] R.R.A. 319, at paras. 121-22). It is therefore understandable that Professor Claude Masse, who favoured the generalized application of the doctrine, recognized in a paper published some time before the *Civil Code of Québec* came into force that the doctrine was “still not well established in our law” (No. 96; see also Lluelles and Moore, at No. 2978).

[69] Furthermore, in *Samen Investments Inc. v. Monit Management Ltd.*, 2014 QCCA 826, a case decided under the new *Code* that concerned a contract of mandate and that was mentioned by the Court of Appeal in the case at bar, it does not seem to have been necessary to refer to the doctrine in order to neutralize the exoneration clause (para. 119 (CanLII); in the instant case, the Court of Appeal in fact stated that the confirmation that the doctrine applied had been an *obiter dictum*), as the case could have been decided on the basis of the concept of gross or intentional fault (see Lluelles

and Moore, at No. 2981, fn. 130). As for the other cases quoted by the Court of Appeal, some of them concerned, among other things, a non-liability clause in a contract of adhesion (*Société de gestion Complan (1980) inc. v. Bell Distribution inc.*, 2009 QCCS 2881, [2009] R.D.I. 569, at para. 53, aff'd 2011 QCCA 320, at para. 28 (CanLII); *Thériault v. Dumas*, 2000 CanLII 5214 (C.Q.), at pp. 5 and 9-10) or a consumer contract (*Pruneau v. Société d'agriculture du comté de Richmond*, 2006 QCCQ 12523, at paras. 70-79 (CanLII)), or could be resolved without discussing the doctrine (*Axa Assurances inc. v. Assurances générales des Caisses Desjardins inc.*, [2009] R.J.Q. 1104, at para. 267).

[70] In conclusion on this point, given the *Code*'s silence in this regard, the basis drawn from the cases and academic commentary that Prelco proposes in support of the existence of a rule of public order of general application that would neutralize a non-liability clause affecting a fundamental obligation is too unsettled to be accepted. Everything suggests that the legislature deliberately chose not to include such a mandatory rule to regulate such clauses in the *Civil Code of Québec*, preferring to leave it to sophisticated parties to themselves manage the risks of nonperformance, and that it would be inappropriate in the circumstances to do so in their place. As we explained above, it can be concluded that the civil law does not lack other resources for dealing with situations that are truly contrary to public order (Lluelles and Moore, at Nos. 2969-77; see also Cossette-Lefebvre, at No. 41).

B. *The Non-liability Clause Is Inoperative Because It Deprives the Obligation of Its Cause*

[71] In coming to its conclusion, the Court of Appeal relied on a second basis: reciprocity of obligations and total absence of cause. This basis is distinct from public order. In the Court of Appeal's view, allowing a debtor to rely on a non-liability clause in order to avoid responsibility for his or her breach of a fundamental obligation is contrary to the idea that the debtor's reciprocal prestation is owed to the creditor, without which the contractual obligation is deprived of its cause.

[72] It is clear here that the Court of Appeal was referring to the requirement, spoken to in art. 1371 *C.C.Q.*, to the effect that it is of the essence of an obligation arising out of a juridical act that there be a cause which justifies its existence. The cause of an obligation, referred to as the "objective" cause, must be distinguished from the cause of a contract, or the "subjective" cause (art. 1410 para. 1 *C.C.Q.*). The "subjective" cause concept concerns each party's reason for entering into the contract, which must be consistent with the law or with public order, or else the contract will be null (art. 1411 *C.C.Q.*; Lluelles and Moore, at Nos. 1066-72).

[73] The "objective" cause, on the other hand, is related to the classical doctrine of cause in the civil law, that is, the [TRANSLATION] "logical, impersonal and abstract reason . . . that justifies a party's acceptance of his or her obligations" (Jobin and Vézina, at Nos. 358 and 363). Citing Henri Capitant, Professors Jobin and Vézina explain that the cause of an obligation "is the purpose the parties had in mind at the time of formation of the contract, but in a synallagmatic contract this purpose is the performance of the correlative obligation" (No. 361, citing *De la cause des obligations*

(*Contrats, Engagements unilatéraux, Legs*) (3rd ed. 1927); Lluelles and Moore, at No. 1063; Pineau, Burman and Gaudet, at Nos. 144, 147 and 171). This implies that a court must [TRANSLATION] “determine that [this interdependence of obligations] exist[ed]” at the time the contract was formed (Lluelles and Moore, at No. 1064.3).

[74] In Quebec law, this objective cause concept is codified in art. 1371 *C.C.Q.*, unlike in France, where it is interspersed throughout the civil code (O. Deshayes, T. Genicon and Y.-M. Laithier, “La Cause a-t-elle réellement disparu du Droit français des Contrats?” (2017), 13 *E.R.C.L.* 418, at pp. 419-21). As Justice LeBel and Professor Berthold explain in an academic paper, the Civil Code Revision Office had proposed abandoning the concept of cause in Quebec law, but the legislature rejected that proposal in 1994 (“La cause”, in V. Caron et al., eds., *Les oubliés du Code civil du Québec* (2014), 193, at pp. 204 and 206). In their opinion, the connection between the concept of cause of the obligation and that of an abusive clause is clear, as the Office had proposed abandoning the former, in part because the application of the latter was to be extended to all contracts (Civil Code Revision Office, vol. II, t. 2, at p. 554; see also Pineau, “Théorie des obligations”, at No. 8). Ultimately, the legislature decided to retain the concept of cause of an obligation and not to adopt a general rule on lesion between persons of full age, but instead adopted a rule of limited scope with respect to the abusive clause concept in art. 1437 *C.C.Q.*

[75] The parties do not dispute that some contract clauses that deprive an obligation of its cause within the meaning of art. 1371 *C.C.Q.* may affect the validity of the obligation.

[76] This is true, for example, of certain no obligation clauses that exclude all prestations that would normally be owed by the debtor, with the result that the creditor's obligations lack reciprocal prestations. Berthold also speaks of [TRANSLATION] "no undertaking stipulations" (*stipulations de non-engagement*), those that exclude "everything one of the parties is normally required to do to ensure that the contractual transaction is carried out" (*Peut-on donner d'une clause et reprendre de l'autre? Essai sur la cause comme instrument de contrôle de la cohérence matérielle du contrat* (2016), at No. 99 (emphasis deleted)). In his opinion, it would also be true of no claims clauses (*clauses de non-recours*), those that deprive the creditor of the obligation of any remedy to sanction nonperformance (Nos. 94, 99 and 110; see also Lluelles and Moore, at Nos. 1064.6, 2968 and 2980). Such clauses, by negating all of the debtor's obligations, deprive the correlative obligation of its cause and impair the reciprocal nature of the contractual relationship.

[77] The crux of the issue in this appeal is therefore as follows: Does a non-liability clause relating to the fundamental obligation of a contract have the effect of depriving the obligation of its cause? Are there circumstances in which a non-liability clause is akin to a no obligation clause that does not meet the requirement of art. 1371 *C.C.Q.*?

[78] It should be noted that there is a conceptual difference between the no obligation clause and the non-liability clause: the former negates the *obligations* that would normally be included in the contract, while the latter excludes the *liability* that would normally flow from nonperformance of the obligations provided for in the contract (see Cossette-Lefebvre, at No. 28). Leveneur-Azémar explains that, unlike the no obligation clause, which concerns the prestations a debtor undertakes to perform, [TRANSLATION] “a non-liability clause applies only at the performance stage, at which it prevents the liability of a debtor who was bound by an obligation but is in default from being triggered” (*Étude sur les clauses limitatives ou exonératoires de responsabilité* (2017), at No. 14). In principle, an exoneration clause or limitation of liability clause affects only the sanction of the payment of damages. It is not, at least by nature, a clause that excludes every obligation or sanction (Nos. 17-18).

[79] Regarding the validity of a non-liability clause where there is a breach of a fundamental obligation, two competing views are advanced by authors.

[80] There are some who disagree with the theory that an exoneration clause or limitation of liability clause can deprive the correlative obligation of its cause, as certain no obligation clauses are said to do. In their view, a debtor’s obligation does not cease to exist simply because a clause limits or excludes his or her liability in the event of nonperformance. Not only does the non-liability clause leave the obligation intact, it also leaves intact the other sanctions that would normally be available upon nonperformance, such as the exception for nonperformance, specific performance,

resolution or resiliation of the contract, or reduction of the correlative obligation (Cossette-Lefebvre, at No. 29). Moreover, because art. 1474 para. 1 *C.C.Q.* bars a debtor from relying on a non-liability clause in a case of gross or intentional fault, and because an arbitrary refusal to perform an obligation would constitute such a fault, the debtor remains bound to perform it: the exoneration clause does not negate the obligation. Finally, the authors who support this view are concerned with the possibility of the cause being relied on to produce effects similar to those of lesion in circumstances in which the legislature does not allow for that (see, generally, Cossette-Lefebvre, at Nos. 26-28).

[81] There are others who maintain that a non-liability clause that is akin to a no claims clause can in fact deprive an obligation of its cause: [TRANSLATION] “[w]here payment by equivalence is the only remaining way for the debtor’s obligations to be performed, a stipulation that excludes it altogether has the effect in practice of draining the debtor’s undertaking of all substance and, through a mirror effect, of depriving the creditor’s undertaking of its cause” (Berthold, at Nos. 124 and 143 (emphasis deleted), and, in the French context, J. Rochfeld, *Cause et type de contrat* (1999), at Nos. 485-86; Aubert de Vincelles, at No. 8; P. Jestaz, “L’obligation et la sanction: à la recherche de l’obligation fondamentale”, in P. Jestaz, ed., *Autour du droit civil — Écrits dispersés, Idées convergentes* (2005), 325, at p. 326). Lluellas and Moore, although critical of the doctrine of breach of a fundamental obligation, concede that it could be supported by the concept of total absence of cause, explaining that [TRANSLATION] “this idea would

be relevant only if the clause denied the creditor any remedy in the event of nonperformance” (No. 2980).

[82] Also according to this view, a simple limitation of liability clause cannot on its own deprive an obligation of its cause. For some authors, however, the objective cause concept should permit a clause to be neutralized not only if the clause negates the cause, but also in cases in which the counterprestation is so trivial or [TRANSLATION] “insignificant” that it can be considered to be non-existent (see the explanations given by Lluelles and Moore, at No. 1064.4, and, in a different context, *Canadian National Railway Company v. Ace European Group Ltd.*, 2019 QCCA 1374, at paras. 41-42 and 45-46 (CanLII)). This has allowed some French academic commentators and judges to ensure [TRANSLATION] “a minimum level of fairness in the contrat” (*ibid.*; see, e.g., F. Terré et al., *Droit civil: Les obligations* (12th ed. 2019), at Nos. 876-78 and 884).

[83] Thus, there are authors who suggest that the courts must verify [TRANSLATION] “the *reality* of the consideration and not simply its materiality” (Lluelles and Moore, at No. 1064.5), subject, of course, to the fact that “the cause must not be used as a pretext to negate the legislative policy with respect to lesion” (No. 1064.5 (emphasis deleted); see also G. Goldstein and N. Mestiri, “La liberté contractuelle et ses limites — Étude à la lueur du droit civil québécois”, in B. Moore, ed., *Mélanges Jean Pineau* (2003), 299, at pp. 336-37). The authors conclude that this principle could in theory apply to a case in which a non-liability clause relates to a

fundamental obligation (Lluelles and Moore, at Nos. 1064.5-1064.6). However they assert that, if there is a sanction, the solution advanced by those espousing this view does not apply (No. 1064.5; see also Jobin and Vézina, at No. 361). It should be mentioned that even authors who are doubtful about this approach recognize that the distinction between a non-liability clause and a no obligation clause is sometimes not watertight (Leveneur-Azémar, at No. 17). What is certain is that if this theory were to apply, Lluelles and Moore point out that it should only be possible for the cause of the obligation to determine whether the consideration is insignificant in “extreme cases” (No. 1064.5).

[84] As we will see, this question does not arise with respect to cl. 7 of the Contract, because of the sanction provided for in the event of nonperformance. This is not a situation in which the counterprestation is insignificant, and even less one in which it is non-existent. The sanction for nonperformance of the fundamental obligation remains, and it cannot be said that the obligation is deprived of its objective cause. This means that the disagreement among the authors is not in issue.

[85] In light of the foregoing, we are of the opinion that it is not necessary to address the question in the context of this appeal. Neither of these positions is without merit. It would therefore be more prudent in the circumstances of this case to refrain from resolving the disagreement in the abstract without taking account of practical difficulties that could arise in the future.

[86] Thus, art. 1371 *C.C.Q.* applies to contract clauses that negate or exclude all of the debtor's obligations and, in so doing, deprive the correlative obligation of its cause. Where a contract includes such clauses, it can be said that the reciprocal nature of the contractual relationship is called into question (arts. 1371, 1378 para. 1, 1380 para. 1, 1381 para. 1 and 1458 *C.C.Q.*). To apply a more exacting criterion would amount to annulling or revising a contract on assessing the equivalence rather than the existence of the debtor's prestation and, as a result, to indirectly introducing the concept of lesion, which is narrowly delimited in the *Code*.

VII. Application of the Law to the Facts of This Case

[87] In this case, Createch committed a fault in performance after having undertaken to deliver and implement, jointly with Prelco, a Microsoft Dynamics NAV integrated management solution at the latter company for an estimated \$650,574 in consideration.

[88] The trial judge concluded his analysis by finding that Createch had not committed a gross or intentional fault (paras. 206-8), that its obligation was one of means (para. 205) and that its simple fault related to a fundamental obligation under the Contract (para. 220). He also found that the Contract, including cl. 7, was a synallagmatic contract for services that had been freely negotiated and was therefore not a contract of adhesion (para. 187), and that the creditor, Prelco, was a sophisticated legal person and not a consumer (paras. 210-11). In other words, neither art. 1437 *C.C.Q.* nor the *Consumer Protection Act* applied to the Contract. Finally, the injury for

which Prelco was seeking reparation was a material injury and not a bodily or moral injury within the meaning of art. 1474 *C.C.Q.* These findings have not been contested.

[89] The trial judge found that the clause was a limitation of liability clause (paras. 190-91 and 225), a finding that was endorsed by the Court of Appeal (para. 49). The limit is described as follows in the first paragraph of the clause: “If such damages result from the delivery of unsatisfactory services, Createch’s liability shall be limited to the amount of any fees paid in relation to the said unsatisfactory services.”

[90] Prelco correctly notes that it is necessary, in interpreting a contract, to take account of the rules of interpretation set out in the *Code*, including art. 1427, which requires that each clause be given “the meaning derived from the contract as a whole”. But it is not the interpretation of the clause that is in issue here. Rather, the trial judge found that Createch’s breach rendered cl. 7 of the Contract inoperative. With respect, that finding resulted from an error of law. We are also of the view that the Court of Appeal erred in law in its justification for upholding the trial judge’s decision to declare cl. 7 inoperative because of Createch’s contractual fault.

[91] On the basis of the rule stated by this Court in *Glengoil* and reaffirmed under the auspices of the *Civil Code of Québec*, cl. 7 is valid and the parties were free to include it in the Contract. It should be understood that Prelco’s argument is based on a perception of unfairness. That being said, there is nothing in this case that would require the courts to intervene to protect a party who is weak or at a disadvantage economically. Moreover, Prelco is advancing no coherent argument based on a

justification related to the general interest of society, such as protection of the human person, that would allow for judicial intervention. This suggests to us that a judge cannot, in the name of judicial public order, propose a principle that is inconsistent with the scheme of the *Code* where there is no legislative basis for doing so. Clause 7 thus does not violate any rule of legislative or judicial public order, nor is there any specific rule relating to nominate contracts that applies to the facts of this case.

[92] Prelco erroneously sought to present breach of a fundamental obligation as a separate category of fault, one that is more serious than or qualitatively different from a simple fault, while at the same time accepting the trial judge’s finding of fact that Createch had not committed a gross or intentional fault. Prelco offers no authority for this recharacterization of an act or omission giving rise to liability, which is at odds with the general theory of contractual liability. We note as well that where the legislature imposes liability on the debtor for breach of a fundamental obligation, as it has done in art. 1437 *C.C.Q.* for the benefit of a consumer or an adhering party, a simple fault suffices to trigger the debtor’s liability as long as the conditions for contractual liability are met.

[93] What can be said about the argument, taken up in part by the Court of Appeal, that cl. 7 is inoperative because of the [TRANSLATION] “reciprocity of obligations” or the “concept of total absence of cause of the obligation” (C.A. reasons, at para. 39)?

[94] In this case, cl. 7 is not a no obligation clause that would exclude the reciprocity of obligations. Despite the wording of cl. 7, Createch owed substantial obligations to Prelco, which Prelco does not deny.

[95] Even if it were necessary to accept the position of the authors in whose opinion a no claims clause can deprive an obligation of its cause — which we are not doing here — the non-liability clause at issue in this case could not be so characterized. It is true that the clause is strict and that it significantly limits the sanctions that can be imposed on Createch. Prelco correctly asserts that, as far as damages are concerned, the clause in question resembles an exoneration clause. Although the first paragraph of cl. 7 permits an action in damages that is limited to amounts paid, the second paragraph has the effect of excluding any entitlement to damages for injuries from a non-exhaustive list that are a consequence of the debtor's default. A *limitation* of liability clause would allow reparation to be obtained for those injuries but would limit the amount of the reparation. However, the first paragraph can be equated to an authorization of specific performance by replacement. In light of art. 1602 para. 1 *C.C.Q.*, which provides that, “[w]here the debtor is in default, the creditor may perform the obligation or cause it to be performed at the expense of the debtor”, the meaning of the clause limiting Createch's liability to the “amount of any fees paid in relation to the said unsatisfactory services” is easy to understand. This clause permits Prelco both to keep the integrated management system and to obtain damages for unsatisfactory services, as well as to be compensated for necessary costs for specific performance by replacement. Finally, we would add that according to the words chosen by the

contracting parties themselves, these limits on liability apply “unless such damages result from gross negligence or wilful misconduct on Createch’s part”, which words are consistent with the constraints of public order provided for in art. 1474 para. 1 *C.C.Q.*

[96] In short, the stipulation in cl. 7 of the Contract excludes any reparation for loss of profits arising from a simple fault. The amount Preco can claim under that clause is therefore limited to what results “from the delivery of unsatisfactory services” by Createch, and in such circumstances “Createch’s liability shall be limited to the amount of any fees paid in relation to the said unsatisfactory services”. The damages in question here total \$79,200, that is, the amount of Preco’s claim for fees paid to Irisco.

[97] The trial judge’s finding was unequivocal: if the items “software” and “maintenance” were excluded from the claim for an overpayment for the services provided by Createch, Preco had not discharged its burden of showing “what portion of the \$1,520,000 represented unnecessary work from which [it] does not now benefit” (para. 233). Because Createch’s work was found to be useful, the clause barred that claim. However, that would not have been the case had the system been found to be unnecessary for Preco’s purposes.

[98] There is therefore a cause. We also understand that Preco’s objections relate not to the existence of that counterprestation, but to its significance. In principle, however, the requirement provided for in art. 1371 *C.C.Q.* that there be a cause is met

if the cause exists, because its existence is what justifies the other party's obligation. In light of Createch's alleged breach in relation to its fundamental obligation, cl. 7 does not deprive the contractual obligation of its cause, but determines the extent of the debtor's liability for the simple fault identified by the trial judge.

[99] Even if we were to concede for the sake of argument that the fact that a sanction is insignificant would justify a conclusion that there is no cause, it could not be argued that such is the case in this appeal. The clause does not exclude all sanctions. In this case, it must instead be concluded that, from the moment the contract was formed, specific performance was possible, and indeed contemplated, in the event of nonperformance. In fact, Prelco has conceded this point in this Court, as it explains in its factum that it gave Createch a "chance to correct its errors and make specific performance". As Createch states, in the circumstances of this case, the non-liability clause in the contract could be characterized as being equivalent to a clause providing for specific performance by replacement (art. 1602 *C.C.Q.*). The effect of the clause thus relates to liability and not to the very existence of the obligation.

[100] It is clear that Prelco is using the concept of objective cause to ground its argument that cl. 7 should be declared to be inoperative because it creates an imbalance in prestations and not, strictly speaking, a situation in which this synallagmatic contract has no counterprestation whatsoever. But that is not the purpose of art. 1371 *C.C.Q.* The cause of the obligation does not permit a court to create a scheme for lesion

between unprotected persons of full age; such a scheme has in fact been rejected by the legislature.

[101] One last point needs to be considered. In principle, where a clause negates a correlative obligation, [TRANSLATION] “it is the contract itself that will succumb to the annulment of the correlative obligation” (Lluelles and Moore, at No. 2980, fn. 127; see also art. 1416 *C.C.Q.*). Pursuant to art. 1438 *C.C.Q.*, however, the nullity of the contract may be partial in appropriate circumstances, that is, [TRANSLATION] “unless it is apparent that the contract may be considered only as an indivisible whole” (Jobin and Vézina, at No. 398; see also Levesque, at No. 202; Pineau, Burman and Gaudet, at Nos. 203 and 205; Karim, *Les obligations*, at Nos. 2353-54 and 2357; Berthold, at No. 165; Lluelles and Moore, at No. 1876). This Court accepted this position in *Fortin v. Chrétien*, 2001 SCC 45, [2001] 2 S.C.R. 500, at paras. 34-37. As Professor Berthold explains, [TRANSLATION] “by removing the conflicting stipulation from the contract”, a court is merely re-establishing the exchange agreed on by the parties (No. 150). What it does is neutralize the legally problematic clause rather than categorically concluding that “the parties to a synallagmatic contract did not intend to make an exchange” (No. 151 (emphasis added; emphasis in original deleted)).

[102] Although the trial judge did not directly address the application of art. 1438 *C.C.Q.*, he noted that the parties had agreed on [TRANSLATION] “risk sharing” and that Createch had therefore given a discount on its regular rates (paras. 20-22). Moreover, Createch is correct to argue that a party can often obtain a [TRANSLATION] “favourable

price” in exchange for a limitation of liability clause. It might therefore be thought that this means the contract is an indivisible whole. As for Prelco, it instead argues that there was no connection between the clause at issue in this appeal and the “risk sharing” negotiated for a [TRANSLATION] “cost overrun” (transcript, at p. 61). Because the contract, including cl. 7, is valid, the issue of nullity — total or partial — does not arise in this appeal, and it is unnecessary to discuss it further.

VIII. Conclusion

[103] In summary, given that neither of the bases for the doctrine of breach of a fundamental obligation applies and that none of the respondent’s arguments are accepted, it is our view that the trial judge and the Court of Appeal erred in law in finding that the limitation of liability clause in the Contract was inoperative. That clause is not ambiguous, and the trial judge could not annul it. The will of the parties had to be respected. Nor could the concept of cause of an obligation justify the decision of the courts below in this case.

[104] For these reasons, the appeal is allowed and the judgment of the Quebec Court of Appeal is set aside in part, as is the trial judge’s decision regarding the award against Createch on Prelco’s heads of claim for claims from customers, loss of profits on sales made and loss of profits on sales lost. Createch is entitled to its costs throughout.

Appeal allowed with costs throughout.

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